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IN THE

Supreme Court of the United States

MAY TERM, 1984

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIENDS OF AMBER TATRO, A MINOR,
Respondents.

ON WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTERESTS OF THE AMICUS CURIAE

In the United States, there are today between 15,000-16,000 public school districts. The amicus, the American Association of School Administrators, is a national educational and charitable organization of the educational administrators who work for these school districts with membership totaling

17,500. The members of the American Association of School Administrators are employed in approximately 90% of the nation's school districts. These school administrators are responsible for advising local school districts on their policies, and providing leadership for the school districts in long-range educational and financial planning.

If the decision in *Tatro* v. *State of Texas*, 703 F. 2d 823 (5th Cir. 1983) (hereinafter *Tatro II*) is upheld, it will have a serious, detrimental impact upon the policies and practices of school districts. Specifically, it will require the school districts to provide clean intermittent catherization (hereinafter CIC) for all students requiring such special services. More important, however, its rationale would require school districts to offer a host of other quasi-medical services on an open-ended basis. An affirmance would seriously impair the financial and educational ability of school districts to provide equal educational opportunity to all children. It is in the interest of administrators of public school districts that we file this amicus brief.

ISSUES PRESENTED FOR REVIEW

I.

DID THE *TATRO II* COURT ERR IN FINDING THAT CIC IS A RELATED SERVICE UNDER THE EAHCA?

II.

DOES THE EAHCA EXCLUSIVELY GOVERN THE RIGHT OF HANDICAPPED CHILDREN TO SPECIAL EDUCATION?

ARGUMENT

Introduction

The *Education for All Handicapped Children Act,* 20 U. S. C. § 1401 *et seq.* (1975) (hereinafter EAHCA) provides that all handicapped children are entitled to a "free appropriate public education" individually suited to their unique needs. Less than two years ago, in *Board of Education of the Hendrick Hudson Central School District Board of Education* v. *Rowley,* ___ U. S. ___, 102 S. Ct. 3034 (1982) (hereinafter *Rowley*) this Court stated that the EAHCA was designed to provide "a basic floor of opportunity" for handicapped children. The Court held that the EAHCA provided handicapped children with a substantive right to a free and appropriate public education, as well as the necessary procedural guarantees to secure that substantive right.

Congress' definition of "free and appropriate public education" encompasses the educational component and the "related services" component necessary for the handicapped student to benefit from the educational program. In *Tatro II,* the court has misconstrued the meaning of the "related services" component of special education. That error must be corrected.

The *Tatro II* court ignored the plain meaning of the statute and its legislative history. Instead, it developed a three part test to measure the extent of related services. That test expands the responsibilities of public schools beyond anything contemplated by Congress when it passed the EAHCA. If affirmed, the *Tatro II* holding will require public schools to provide handicapped students with quasi-medical services which schools are unequipped to provide and which are not services related to the student's education.

The *Tatro II* decision also raises for this Court's consideration the issue of the interrelationship between the EAHCA

and Section 504 of *The Rehabilitation Act of 1973*, 29 U. S. C. § 794 (1978 Supp. III) (hereinafter Rehabilitation Act). The EAHCA does not provide for attorneys' fees. The Rehabilitation Act does. 29 U. S. C. § 794a (1978 Supp. III) In *Tatro II*, the court held that a school district's failure to provide CIC violated both the EAHCA and the Rehabilitation Act; the court awarded the plaintiffs attorneys' fees pursuant to the attorneys' fees provision of the Rehabilitation Act. The award of attorneys' fees is contrary to the intent of Congress that a violation of the rights of special education students is exclusively governed by the remedies of EAHCA.

The *Tatro II* court's misreading of Congressional intent disregards this Court's teaching in *Rowley* and *Southeastern Community College* v. *Davis*, 442 U. S. 397 (1979). The *Tatro II* decision subjects public school districts and their administrators throughout the United States to a damage remedy never contemplated by Congress when it enacted the EAHCA.

I.

THE *TATRO II* COURT ERRED IN FINDING THAT CIC IS A RELATED SERVICE UNDER THE EAHCA.

A.

Neither the EAHCA Nor Its Implementing Regulations Support the Court's Holding.

The EAHCA provides all handicapped children the right to a free and appropriate public education as defined in the EAHCA and its regulations promulgated by the Department of Education at 34 C. F. R. § 300.13 (1982). The basic substantive educational right is defined in the EAHCA as:

> (18) "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards

> of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under Section 1414(a)(5) of this title." 20 U.S.C. § 1401(18) (1975).

Further definitions of "special education" and "related services" are found in Sections 1401(16) and (17) of the EAHCA. They state:

> (16) "The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions, as well as related services." 20 U.S.C. § 1401(16) (1975).
>
> (17) "The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children." 20 U.S.C. § 1401(17) (1975).

The regulations define "medical services" as:

> "(4) 'Medical services' mean services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services. 34 C. F. R. § 300.13(4)(b) (1982).

By express definition, school districts need not provide medical services to handicapped students unless they are solely for diagnostic and evaluation purposes. 20 U. S. C. § 1401(17) (1975). The legislative history of the EAHCA reveals that when the EAHCA was before the Senate there was no provision

for any medical services in the Act. *See* S. 6, 94th CONG., 1st SESS (1975). In the House, amendatory language was added to the EAHCA allowing special education students to receive "medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only." S. CONF. REP. No. 94-455, 94th CONG., 1st SESS., 30 (1975), *reprinted in* 1975 U. S. CODE CONG. AND AD. NEWS 1425, 1483. Under the plain language of the final statute, Congress did not require school districts to furnish medical services to a special education student.

The *Tatro II* court acknowledges that medical services should not be furnished to a special educational student. Instead, it held that CIC is a "supportive service", thus avoiding the statutory prohibition against furnishing medical services. The court's holding has no basis in the statute or regulations.

B.

The *Tatro II* Court's "But For" Test for the Provision of Related Services Has No Basis in the Statute.

Hard cases indeed make bad law. The *Tatro II* court created out of thin air a new three-part test so as to read the requirement of quasi-medical services into the IEP of a spina bifida child. First, a child must need special education. Second, the particular service must be necessary to aid a handicapped child to benefit from special education. Third, a school district must provide quasi-medical services if they can be furnished by a nurse or other qualified person. This test has no basis in the EAHCA. Moreover, the court's application of the test leads to results inconsistent with the *Rowley* test of educational benefit to the child.

In applying the second prong of its three part test, the Fifth Circuit applied a "but for" test to the facts. *Tatro II,* in its simplest terms, holds that the student was entitled to CIC as a related service because she could not attend her program "but for" the CIC. The court held, therefore, that CIC is educationally necessary.

The "but for" rule of *Tatro II* violates the teaching of *Rowley,* which is that the financial and social burdens of providing supportive services to special education students should not be placed upon a school district simply because the services will provide optimum benefit to a student. In *Rowley,* this Court interpreted the EAHCA as requiring the states to provide educational opportunity and services. Pursuant to *Rowley,* a school district need only provide related services in an IEP calculated to provide a student an educational benefit. Under the "but for" rule of *Tatro II,* however, a school district must provide any quasi-medical or health services which are in any way necessary to the student.

The appellate court's holding in *Tatro II* and in *Tatro* v. *State of Texas,* 625 F. 2d 557 (5th Cir. 1980) (hereinafter *Tatro I*) has been criticized by the Circuit Court of Appeals in *Kruelle* v. *New Castle School District,* 642 F. 2d 687 (3rd Cir. 1981). The court stated:

> "... there is an inner dynamic to the *Tatro* analysis which is troublesome: ultimately any life support system or medical aid can be construed as related to a child's ability to learn." 642 F. 2d at 594.

If properly applied, the *Rowley* standard of educational benefit for provision of related and supportive services will result in a finding that CIC is not a related service. It is undisputed in *Tatro II* that the student benefited educationally from her initial placement in which the school district did not

provide CIC. Judge Higginbotham, in the initial trial court ruling in this matter, correctly upheld the school district's IEP, refusing to provide CIC services. *Tatro* v. *State of Texas,* 481 F. Supp. 1224 (N. D. Tex. 1979).

Moreover, the facts and claims in *Tatro II* are essentially similar to the facts and claims in *Rowley,* thus requiring a similar result. Rowley had attended classes without an interpreter. The parents in *Rowley* sought to alter the school district's IEP to include a sign language interpreter to provide the student "an opportunity to achieve her full potential commensurate with the opportunity provided to other children." *Rowley,* 102 S. Ct. at 3040 (1983). This Court found that Rowley had been attending school without an interpreter and was "interact[ing] and communicat[ing] well with her classmates. . ." *Id.* Rowley's sole claim, then, was that she was not "learning as much, or performing as well academically" as she would without a handicap. *Id.*

The Respondent, like the *Rowley* child, has attended her classes with her parents and babysitter performing the necessary CIC procedure during the school day, between January 26, 1981, to April 1, 1981, under the school district's original IEP. *Tatro* v. *State of Texas,* 516 F. Supp. 968, 972 (N. D. Tex. 1981). Her parents did not challenge the adequacy of the Petitioner's IEP or her placement in the early childhood development classes. They have challenged who was to furnish the CIC. As in *Rowley,* no question exists that the Respondent can benefit educationally without the supportive service of CIC. *Rowley,* accordingly, compels reversal of the *Tatro II* decision.

A ruling by this Court that the school district is not required to provide handicapped children with services such as CIC does not prevent the child from obtaining these services from other public health agencies. Any number of other state

and private organizations can provide and administer CIC; any necessary financial assistance is available from public health departments or under medical insurance plans. These agencies, not school districts, are the proper providers of services such as CIC, or such services as tracheostomies and kidney dialysis.

Every health service can be construed in some way to benefit a student in special education, for many, many special education students have related health problems. The EAHCA does not mandate medical services. They should not be required by renaming them as supportive services. *Rowley* requires handicapped children to receive supportive services that benefit them *educationally*. Failure to place this important limitation upon the furnishing of supportive services would place an unreasonable financial and social burden on school districts in contravention of the EAHCA.

C.

Medical Services Need Not Be Provided Under the Rubric of School Health Services.

The *Tatro II* court's third prong of its test is that a related supportive service can include any quasi-medical service so long as it can be performed by a qualified nurse or other trained person. This rule vastly extends the scope of related services to include all types of quasi-medical services which school districts are not in any manner equipped to perform.

There are some 15,000 to 16,000 school districts in the United States, with roughly 9,000 of these districts educating fewer than 2,000 students a year. Only 750 districts in our nation educate more than 10,000 students each year. The vast

majority of school districts in our nation are located in rural areas. They do not employ nurses and they are not equipped with the personnel nor the facilities to administer the type of services required by *Tatro II*. The cost of administering and hiring personnel to provide quasi-medical services would be financially staggering to school districts. If these services are mandated, and neither funds nor professional personnel are available, school districts would have to seek teacher volunteers to perform these services. Should no volunteers come forward, what then? Can the staff be forced to undertake a quasi-medical procedure?

An example of the consequences of an unwilling staff forced to perform these services is apparent in *Department of Education, State of Hawaii* v. *Katherine D.*, 531 F. Supp. 517 (D. Hawaii 1982), in which school personnel had filed a grievance charging violation of their contracts of employment by being required to perform duties of a medical nature, outside the scope of their contractual duties. The district court took specific notice of the school district's failed efforts to provide a handicapped child with a qualified individual to perform a tracheostomy.

> "At first glance, it may appear that the attitude of the school personnel was one of callousness and a 'lack of feeling' but when you explore the circumstances, it becomes clear that they responded to the plan with fear and trepidation. Fear that they could not perform the medical procedure correctly and that the child might die at their hands; or fear of the personal aspects of the procedure itself; and/or the fear of being sued if something untoward occurred during the procedure. These are genuine and legitimate fears and understandably so. Therefore, I cannot fault the school personnel for objecting to being asked to perform such medical procedures." 531 F. Supp. at 524.

The *Tatro II* definition of related services under the EAHCA is so broadly written that it includes *any* quasi-medical service that a handicapped student requires which a nurse or other qualified person can perform. Thus, services, such as CIC, tracheostomies and kidney dialysis would be included under "related services". This definition does not comport with the intent of Congress, as established in *Rowley,* and the plain language of the statute and regulations that require medical services solely to diagnose and evaluate a handicapping condition.

The statutory limitation on rendering services is premised on the *educational* rights of the handicapped child. The *Tatro II* holding simply ignores the fact that *education* is the foundation of the EAHCA. If *Tatro II* is affirmed, school districts would be forced to bear greatly increased expenses in the areas of personnel, insurance and costs of training their school personnel to comport with the quasi-medical needs of all handicapped children. The resultant burdens of the *Tatro II* decision are not in keeping with the holding or spirit of *Rowley.*

II.

THE EAHCA EXCLUSIVELY GOVERNS THE SPECIAL EDUCATION RIGHTS OF HANDICAPPED CHILDREN.

The second major issue raised by *Tatro II* is whether a school district's decision to provide or not provide a particular related service is actionable under both the EAHCA and the Rehabilitation Act. If so, can the attorneys' fees provision of the Rehabilitation Act be used to supplement remedies available under the EAHCA?

In *Tatro II,* the court held that, if a claim made under the

Rehabilitation Act is factually identical to a claim under the EAHCA, the Respondent gains access to Rehabilitation Act remedies otherwise unavailable under the EAHCA.

That holding is contrary to the intent of Congress that a student's right to special education services is exclusively found in the EAHCA. Two circuit courts that have considered the issue have properly applied this Court's teachings in *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1 (1981) and *Rowley, supra.* These circuit courts have held that the EAHCA was intended as an exclusive remedy for violations of a student's right to special education. The Rehabilitation Act, according to these holdings, are unavailable as a cause of action for denial of rights created by the EAHCA. *Smith* v. *Cumberland School Committee,* 703 F. 2d 4 (1st Cir. 1983), *cert. granted, sub nom, Smith* v. *Robinson,* ____ U. S. ____, 52 U. S. L. W. 3342 (1983); *Timms* v. *Metropolitan School District,* ____ F. 2d ____, 1983-1984 Ed. Hand. L. Rptr. 555:178 (7th Cir. 1983).

A.

The EAHCA Solely Governs This Claim.

The EAHCA is a comprehensive law creating a substantive right to special education for handicapped children and creating detailed procedural protections to assure that the substantive rights created by the statute are not violated.

The only substantive question raised by *Tatro II,* as discussed above, is whether CIC qualifies as a related service. The Respondents also allege that the refusal to provide this particular special education service violates the general nondiscrimination requirements of the Rehabilitation Act so as to gain access to the attorneys' fees provision in that statute.

The Respondents' claim, however, is completely resolvable pursuant to the detailed procedural protections created by the EAHCA. This Court in *Rowley* emphasized the comprehensiveness of the procedures and the importance Congress placed upon the statute's procedural guarantees, holding:

> "It seems to us no exaggeration to say that Congress placed every bit as much emphasis on compliance with procedures ... as it did upon the measuring of the resultant IEP against a substantive standard." 102 S. Ct. at 3050.

The EAHCA provides for judicial review of administrative decisions. 20 U. S. C. § 1415(e)(2) (1975). The Court determined the scope of that review in the *Rowley* holding that Section 1415(e)(2) requires the court to determine whether the state has complied with the procedures set forth in the Act and whether the IEP is "reasonably calculated to enable the child to receive his educational benefit". *Rowley*, 102 S. Ct. at 3051. In other words, a court may review both the substance of the special education placement and whether the school district was in compliance with the EAHCA's procedural guarantees. There is no need to refer to a general non-discrimination statute, particularly when the claim is, as in this case, the narrow one of furnishing a related service.

As the Seventh Circuit recently stated:

> "A reading of the broad provisions of the *EAHCA* in light of the Supreme Court's interpretation inevitably leads to the conclusion that the *EAHCA* itself meets all a parent's needs to assure their children receipt of the benefits of the Act..." *Doe* v. *Koger*, 710 F. 2d 1209, 1213 (7th Cir. 1983).

The exclusiveness of the remedies created by the EAHCA is reinforced by two recent opinions of this Court considering the same question in the context of other statutes. In *Great American Federal Savings and Loan Association* v. *Novotny*, 442 U. S. 366 (1979), the Court held that 42 U. S. C. § 1985 (1980) could not be invoked to redress violations of Title VII.

29 U. S. C. § 2000(e) (1981). In so holding, the Court noted that Title VII, like the EAHCA, creates a "detailed administrative and judicial process designed to provide opportunity for non-judicial . . . resolution of claims." *Novotny*, 442 U. S. at 372-373. Previously, in *Brown* v. *GSA*, 425 U. S. 820 (1976), this Court had considered Section 717 of Title VII and found, in light of "the balanced completeness and structural integrity" of Title VII, that Congress had intended to create an "exclusive pre-emptive administrative and judicial scheme . . ." 425 U. S. at 829.

In the EAHCA, as the Court noted in *Rowley*, Congress created new substantive rights and a detailed administrative and judicial procedure to protect those rights. That procedure is clearly intended by Congress as the exclusive remedy for violation of these substantive rights. This conclusion is compelled by comparing the EAHCA to the Rehabilitation Act.

B.

The Rehabilitation Act Is Not Applicable to the *Tatro II* Case.

Unlike the EAHCA, the Rehabilitation Act is a broad nondiscrimination statute which prohibits recipients of federal aid from discriminating against otherwise qualified handicapped persons. The meaning of this statute was considered by the Court in *Southeastern Community College* v. *Davis, supra.* The Court considered a claim by a deaf student that the Rehabilitation Act requires a college to take affirmative action so that it could dispense with its requirement that students in the nursing program effectively communicate orally. The Court held that the Act did not require such affirmative action:

> "The language and structure of *the Rehabilitation Act of 1973* reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handi-

> capped persons and the affirmative efforts to overcome the disabilities caused by handicaps." 442 U. S. at 410.

The Court then went on to consider regulations of the Department of Health and Education, which arguably required affirmative action on the part of recipients of public aid:

> "If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute." 442 U. S. at 410.

The Rehabilitation Act, unlike the EAHCA, does not in any sense address the question of the appropriateness of a student's special education placement or the appropriateness of a particular related service provided or withheld to a special education student. This is, however, the only issue raised by the Respondents in *Tatro II*. In other words, the Petitioner has not discriminated against the Respondent on the basis of her handicap. It has provided her an appropriate special education placement with appropriate related services. To the extent the Respondent's parents disagree with the IEP, they have an express and exclusive remedy created by the EAHCA.

The irrelevance of the Rehabilitation Act to students' special education claims is reinforced by this Court's decision in *Pennhurst State School and Hospital* v. *Halderman, supra. Pennhurst* determined that Section 6010 of the *Developmentally Disabled Assistance and Bill of Rights Act*, 42 U. S. C. § 6010 (1978 Supp.), did not confer enforceable substantive rights on the beneficiaries of the Act. In so holding, the Court referred to *Southeastern Community College* v. *Davis, supra*, and noted the failure of the lower court, like the court in *Tatro II*,

> "... to recognize the well-settled distinction between congressional 'encouragement' of state programs and the imposition of binding obligations on the States ... Relying

> on that distinction, this Court, in *Southeastern Community College* v. *Davis;* . . . rejected a claim that 504 of *The Rehabilitation Act of 1973,* which bars discrimination against handicapped persons in federally funded programs, obligates schools to take affirmative steps to eliminate problems raised by an applicant's hearing disability. Finding that 'state agencies such as Southeastern are only "encouraged[d]" . . . to adopt and implement such policies and procedures;' . . . we stressed that 'Congress understood [that] accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.' " 451 U. S. at 27.

The question of the appropriateness of a related service or special education placement has nothing to do, in the normal circumstance, with discrimination against otherwise qualified handicapped individuals. The provision or non-provision of a particular service or placement is the result of affirmative obligations specifically created by Congress in the EAHCA. When Congress has created such an affirmative obligation and created a detailed and comprehensive remedial structure to resolve disputes, that procedure should be considered exclusive.

Congress created the EAHCA and its remedial structure. It specifically failed to create a right to attorneys' fees as part of its remedies. To allow the Respondent access to the Rehabilitation Act solely to gain attorneys' fees when the claim is identical to the EAHCA clearly defeats the intent of Congress in passing the EAHCA. *See Timms* v. *Metropolitan School District, supra; Smith* v. *Cumberland School Committee, supra.* The Court should not allow plaintiffs to use other statutes as a means of obtaining remedies not provided by Congress in the EAHCA.

Absent an unequivocal Congressional expression of intent to the contrary, there is simply no basis to subject school districts and school administrators to a damage remedy never intended by Congress.

Conclusion

The American Association of School Administrators, as amicus curiae, respectfully requests this Court to effectuate the intent of Congress and find that CIC is not a related service under the EAHCA. The amicus curiae further requests that the Court prohibit the use of the Rehabilitation Act as a conduit to obtain attorneys' fees when the substantive claim in question is identical to that posed under the EAHCA.

Respectfully submitted,

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